

(2008) 01 GUJ CK 0051
In the Gujarat High Court

Case No : Company Application No. 554 of 2007 in Official Liquidator Report No. 149 of 2007 in Company Petition No. 261 of 2004 and Company Application No. 555 of 2007 in Official Liquidator Report No. 150 of 2007

Keventer Agro Ltd.

APPELLANT

Vs

O.L. of Kengold (India) Ltd. and Another

RESPONDENT

Date of Decision : 18-01-2008

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 137, 138 151, 187, 26
Companies Act, 1956 — Section 457, 528, 529, 529A, 530
Customs Act, 1962 — Section 126
Income Tax Act, 1961 — Section 178(3)

Citation : (2008) 146 CompCas 495

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Thakkar Assoc. No. 1, for the Appellant; Official Liquidator for Respondent No. 1, Amee Yajnik and Nanavati Associates, for the Respondent

Judgement

K.A. Puj, J.—Since common issue is involved in both these Company Applications, the same are disposed off by this common judgment and order.

2. The applicant, namely, Keventer Agro Ltd., has taken out these two Judge's Summons making similar prayers in respect of two different lots of properties of the Company in liquidation, which have been purchased by it. The prayers made therein are as under:

(A) That this Hon''ble Court may be pleased to declare that in terms of the terms and conditions of sale the applicant shall be the absolute owner of the land in question, free from encumbrances, on payment of all dues of the land for the period from the date of passing of the order of winding-up and further on payment of balance consideration money and the applicant should not be held up for delay and/or non payment of pre-winding up dues of land in question;

(B) That this Hon''ble Court may be pleased to direct the Official Liquidator as well as the Land Revenue Department to take all necessary steps to inform the applicant the dues on the concerned land on and from the date of passing of the order of the winding-up and with further direction that on payment of all dues from the date of passing of the winding-up order all entries and charges in the land revenue records on the concerned land be removed in order to enable the petitioner to deal with and/or use the concerned land for setting up the project free from encumbrances;

3. An affidavit in support of Judge's Summons is filed by Shri Satishbhai Trivedi, an authorised officer of the applicant Company. It is stated therein that by order dated 16.6.2005 made by this Court in Company Petition No. 261 of 2004, the Company in liquidation was ordered to be wound up and the Official Liquidator attached to this Court was appointed as its Liquidator. The Official Liquidator issued advertisement inviting bids for the sale of land admeasuring about 75475.89 Sq. Mtrs., situated at Block No. 254/P, 289, 293, 294, 295 of Mouja-Chharodi, Taluka-Sanand, Dist. Ahmedabad, which was described as Lot No. I. The Official Liquidator has also issued advertisement inviting bids for the sale of land admeasuring about 29542 Sq. Mtrs., situated at Block No. 287, 288 of Mouja-Chharodi, Taluka-Sanand, Dist. Ahmedabad, which was described as Lot No. III-A and the plant, machineries and all other movables including building super structures except TK Office, records and compound wall which was described as Lot No. III-B and composite offer i.e. Lot No. III-A and III-B except records, which was described as Lot No. III-C.

4. The applicant made bid for the subject land after depositing the EMD as per the advertisement and the applicant was found to be the highest bidder before the Sale Committee for Lot No. I and III-C at an offer of Rs. 237 lacs and Rs. 200 lacs respectively. The Official Liquidator submitted OLR Nos. 149 and 150 of 2007 before this Court seeking confirmation of sale in favour of the applicant in respect of the land being Lot Nos. I and III-C respectively. During the course of hearing of the OLR before this Court the applicant revised his offer to Rs. 260 lacs and Rs. 270 lacs for Lot No. I and Lot No. III-C respectively. This Court vide its order dated 23.8.2007 made in OLR Nos. 149 and 150 of 2007 confirmed the sale in favour of the applicant. Apropos to the terms and conditions of the order confirming the sale in favour of the applicant, the applicant has deposited Rs. 65 lacs and Rs. 67.5 lacs being the 25% of the purchase consideration of Rs. 260 lacs and Rs. 270 lacs for Lot No. I and Lot No. III-C respectively.

5. Since the applicant wanted to avail financial assistant to pay the balance amount of 75%, the applicant approached Allahbad Bank which in turn insisted to inspect the premises as also the revenue records in respect of the subject land. The applicant made an application being Company Application No. 478 and 479 of 2007 seeking permission to inspect the assets sold to the applicant. This Court vide its order dated 18.10.2007 has not entertained the said application and recorded that the applicant shall be at liberty to have inspection after

making full payment of sale consideration. Being aggrieved by the said order dated 18.10.2007 passed by this Court in Company Application Nos. 478 and 479 of 2007, the applicant filed OJ Appeal No. 238 and 239 of 2007 before the Division Bench of this Court and the Division Bench vide its order dated 25.10.2007 allowed the said Appeals and granted permission as prayed for. The applicant thereafter has taken inspection of the assets sold to the applicant and has also taken inspection of the revenue records in respect of the subject land. Upon perusal of the revenue records and in particular extracts of Village Form No. 7/12 the applicant has found that there is mutation of charge of the Sales Tax Department in respect of the Sales Tax due against the Company in liquidation as also charge on account of land revenue. Keeping in view the aforesaid mutation made in the revenue records, the bank which was to grant financial assistance to the applicant has started showing reluctance to extend the financial assistance to the applicant over the subject land in view of mutation of the charge of the Department of Sales Tax as also charge in respect of the land revenue.

6. In the above background present two applications have been filed by the applicant seeking aforesaid prayers.

7. Mr. Navin Pahwa, learned advocate appearing for the applicant has submitted that Clause-15 of the terms and conditions of the tender document for sale runs as follows:

The purchaser shall be liable to pay all statutory dues, if any, due and payable on the properties of the subject company for the period after the date of winding up order. The payment of such dues for pre-liquidation period shall be settled as per the provisions of the Companies Act, 1956. However dues, taxes, cess, if any, applicable on the sale of assets shall be paid by the purchaser.

8. He has further submitted that based on the aforesaid clause the applicant wrote a letter dated 5.11.2007 to the Official Liquidator requesting him to confirm the details of all the dues that pertained to pre-winding up and post-winding up period and to identify the liabilities in terms of Clause-15 of the terms and conditions. In the said letter the applicant informed the Official Liquidator about the details of the charges found on the subject land. The applicant received a letter dated 23.11.2003 on 28.11.2007 from the Official Liquidator but the said letter has not replied the queries raised by the applicant by its letter dated 5.11.2007. Mr. Pahwa has further submitted that the applicant is ready and willing to pay the balance consideration in terms of order of this Court. He has further submitted that the applicant is ready and willing to pay all statutory dues payable on the properties of the Company in liquidation for the period after the date of winding up order but the applicant reasonably apprehends and in fact is informed by the local authorities that even after the payment of liabilities from the date of the order of the winding up, as mentioned in Clause-15 of the tender document, the land will not be free of charge unless payment of dues for the pre-winding up period is made and in case the land is not free of charge on payment

of the balance consideration money as well as the liabilities mentioned in Clause-15 of the said tender document from the date of passing of the winding up order then and in such event, the applicant will not be in a position to use the land in a manner whatsoever far less in setting up of project. He has, therefore, submitted that the applicant should not be held up for non payment of pre-winding up dues of subject. He has further submitted that the applicant needs to create charge on the said land after payment of the aforesaid sum in order to set up the factory but no bank and/or financial institution will render any financial assistance to the applicant in case the charge mentioned in the land revenue report is not removed. He has, therefore, requested this Court to pass a declaratory order to the effect that on payment of balance consideration money and on payment of all dues in terms of tender documents by the applicant from the date of passing of the winding up order on the subject land, the land will be free from all encumbrances and charges and the applicant shall be free to deal with the subject land.

9. Mr. Pahwa has further submitted that as per the provisions contained in Section 529 and 529A of the Companies Act, 1956 only secured creditors and workmen are having pari passu charge over the assets of the Company. They are to be paid in priority to all other debts. Section 530 of the Act deals with preferential payment and Sub-section (1)(a) thereof states that in a winding up, (subject to the provision of Section 529A, they shall be paid in priority to all other debts, all revenue taxes, cess and rate due from the Company to the Central or the State Government or the local authority at the relevant date as denied in Clause-C of Sub-section 8, and having become due and payable within 12 months next before that date. Sub-section 8 of Section 530 states that the expression "the relevant date" means (i) in the case of a company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date; and (ii) in any case where Sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company.

10. Keeping the above provisions in mind, Mr. Pahwa has submitted that the Official Liquidator has, vide his letter dated 23.11.2007 informed the applicant that the dues pertaining to pre-winding up period are to be settled by the Official Liquidator as per the provisions of Section 529, 529A and 530 of the Companies Act, 1956 and that too with prior sanction of this Court. He has, therefore, submitted that the applicant is not liable to discharge any liability of the Company pertaining to the pre-winding up period.

11. In support of his submissions Mr. Pahwa relied on the decision of Bombay High Court in the case of Anchor Health & Beauty Care Ltd. and Anr. v. Municipal Corporation of Greater Bombay and Ors. reported in 2005(10) LJSOFT (URC) 6, wherein it is held that the petitioners' liabilities would arise only on purchase. u/

s 457 of the Act, the Liquidator has power to sell the movable and immovable properties. u/s 528 all debts payable on a contingency, and all claims against the company, present or future, are admissible to proof against the company. By virtue of Section 529 the same Rules are in force for the time being under the law of Insolvency with respect to the estates of persons adjudged insolvent would be applicable. Various other provisions give certain priority to secured creditors and other unsecured creditors, preferential payment in Section 530 of the Act. Since the respondent Corporation in that case is one of the creditors of the Company in winding up and as a creditor it has to file a claim with the Liquidator. Once the Liquidator sells the properties from the realization of the assets of the Company to be paid to the creditors in order of preference. The Court further held that the purchaser of the property from a Liquidator of the Company in winding up is not liable to pay the taxes for the period previous to his purchase. All claims before the purchase will have to be filed before the Official Liquidator and it is for the Liquidator to consider the priority of the claim in accordance with the provisions of Companies Act.

12. Mr. Pahwa further relied on the decision of this Court rendered on 13.6.2006 in Company Application No. 235 of 2005 in the case of Assistant Commissioner of Income Tax v. O.L. of Minal Oil & Industries Ltd., wherein it is held that considering the proviso to Section 178(3) of the Income Tax Act, 1961 read with Section 530 of the Companies Act, 1956, the applicant is not entitled to any relief as prayed for and the application is required to be rejected by holding that the claims of the secured creditors as envisaged u/s 529 of the Companies Act would have a preference/priority over the dues of the Income Tax Department, meaning thereby, the dues of the Income Tax Department would not have any preference or priority over the claims of the workmen and/or secured creditors as envisaged u/s 529A of the Companies Act.

13. Mr. Pahwa has further relied on the decision of this Court rendered on 6.7.2006 in Company Application No. 172 of 2005 in the case of Commissioner of Customs v. O.L. of GIL Hospitals Ltd, wherein it is held that the claim of the applicant that on passing the order of confiscation of 13 medical equipments, the same vests in the Central Government by virtue of Section 126 of the Customs Act, 1962, cannot be accepted and action of the Official Liquidator in taking custody, possession and control of the assets and properties including the above 13 medical equipments is to be valid and legal.

14. Based on the aforesaid decisions Mr. Pahwa has submitted that on payment of full consideration the applicant is supposed to get the clear title to the property and the property has to be free from all charges and encumbrances. The applicant cannot be made liable to pay the sales tax dues as well as revenue charges, which are pertaining to the pre-winding up period. He has, therefore, submitted that the prayers made in the present application are required to be granted.

15. Mr. Nitin Mehta, learned advocate appearing for the Official Liquidator on the

other hand has submitted that the sales tax dues and land revenues are required to be given priority and since there is an attachment over the property sold to the applicant, unless and until the dues are paid, the applicant will not get the clear title.

16. Mr. Mehta has relied on the decision of Bombay High Court in the case of Balmukund Jagjivan Gujarathi Vs. The Collector Ahmednagar, wherein it is held that Section 137, which confers priority upon the Crown for land revenue over other debts of the person liable for land revenue, cannot be said to provide a method or be a rule for the recovery of arrears of land revenue within Section 26 of the Code. The provisions of Sections 137 and 151 giving priority in respect of Government claims for land revenue relate to matters of title, whilst Section 26 makes applicable to public money due by a revenue officer only the machinery for the recovery of arrears of land revenue.

17. He further relied on the decision of the Bombay High Court in the case of The Secretary of State for India Vs. Vedavyas Venkatesh Bhatta, wherein it is held that Section 137 gives priority to the claims of the Government, which is more extensive than the common law prerogative, since it creates a right to priority over all debts of every kind whether secured or unsecured. It is, however, to be read with Section 151, which restricts the prerogative by confining the preference given or declared by Section 137 to demands for the current year.

18. Mr. Mehta further invited court's attention to the relevant provision of Bombay Land Revenue Code, 1879. Section 137 deals with the claims of State Government to have precedence over all others. It says that the claim of the State Government to any moneys recoverable under the provisions of this Chapter, shall have precedence over any other debt, demand, or claim whatsoever, whether in respect of mortgage, judgment-decree, execution or attachment or otherwise howsoever, against any land or the holder thereof. He further invited the Court's attention to the provision contained in Section 151, which deals with revenue demands of former years how recoverable, which says that the said processes may be employed for the recovery of arrears of former years as well as of the current year, but the preferences given by Sections 137 and 138 shall apply only to demands for the current year, Provided that any process commenced in the current year shall be entitled to the said preferences, notwithstanding that it may not be fully executed within that year. Similarly Section 187 of the Code says that all sums declared by this or by any other Act or Regulation at the time being in force or by any contract with the Government to be leviable as an assessment, or as a revenue demand, or as an arrears of land revenue, shall be recovered. He has, therefor, submitted that unless and until the payment of sales tax as well as land revenue is paid, the declaration sought for by the applicant in the present application cannot be and should not be made by this Court.

19. Mr. Mehta has further relied on the decision of the Apex Court in the case of Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, wherein it is

held that Section 158(1) of the Karnataka Land Revenue Act specifically provides that the claim of the State Government to any moneys recoverable under the provisions of Chapter XIV of the Act shall have precedence over any other debt, demand or claim whatsoever including in respect of mortgage. Section 158 of the Act not only gives a statutory recognition to the doctrine of the State's priority for recovery of debts but also extends its applicability over private debts forming the subject matter of mortgage, judgment-decree, execution or attachment and the like. It is further held therein that the effect of Section 190 is to make the procedure for recovery of arrears of land revenue applicable for recovery of sales tax arrears. The effect of Section 158 is to accord primacy to all the moneys recoverable under Chapter XIV, which will include sales tax arrears.

20. Based on the aforesaid judgments and the statutory provisions, Mr. Mehta has strongly urged that the declaration sought for by the applicants cannot be granted in these two applications and the applicants are liable to discharge their liabilities for payment of sales tax dues as well as land revenues which are attached with the property purchased by them.

21. Having heard learned advocates appearing for the respective parties and having gone through the relevant statutory provisions and decided case law on the subject as well as the terms and conditions of the tender document, the Court is of the view that this is a case where the Court has to show its indulgence even at this stage. As far as payment of land revenue charges are concerned, Mr. N.K. Pahwa, learned advocate appearing for the applicants has fairly submitted that the applicants will pay the said charges to the land revenue authority and hence, they will not press this ground so far as payment of land revenue charges is concerned. The only question which requires consideration of this Court is with regard to the payment of sales tax arrears. Before dealing with the rival contentions raised by the parties before the Court, it is necessary to have a close look at Clause 15 of the terms and conditions of the sale. It says that the purchaser shall be liable to pay all statutory dues, if any, due and payable on the properties of the subject Company for the period after the date of winding up order. The payment of such dues for pre-liquidation period shall be settled as per the provisions of the Companies Act, 1956. However, dues, taxes, cess, if any, applicable on the sale of assets shall be paid by the purchaser. There is no dispute about the fact that the sales tax dues are pertaining to the pre-liquidation period. The said liability did not arise after winding up order is passed by this Court. The payment of such dues for pre-liquidation period shall, therefore, be always settled as per the provisions of the Companies Act, 1956. Provisions of Section 529 & 529A of the Act clearly indicate that the Secured Creditors and the workers have pari passu charges over the assets of the Company in liquidation and they are to be paid first and the sales tax dues which are of pre-liquidation period are to be settled in accordance with the provisions contained in Section 530 of the Companies Act, 1956. In any case, the concerned authority must lodge its claim before the OL and such authority cannot demand payment of arrears of sales tax dues pertaining to the pre-liquidation period,

from the purchaser who has purchased the property through Court auction. Even otherwise, the question of payment would arise only when the actual disbursement takes place. Once the sale consideration has been paid by the purchaser pursuant to the order of the Court passed while confirming the sale in his favour, such purchaser cannot be saddled with the liability of arrears of sales tax dues. Such purchaser will get clear title over the property without any charge or encumbrance even if there is an attachment by the sales tax authority. This Court has held in the case of *Anant Mills Limited (In Liquidation) v. City Deputy Collector* (1972) 42 Comp Cas 476 that attachments of Company's assets by the Employees State Insurance Corporation, Payment of Wages Authority, Regional Provident Fund Commissioner and others are ineffective against the Liquidator. It is held in the case of *State of Madhya Pradesh Vs. Dewas Biscuit Factory Dewas etc.*, that an Unsecured Creditor who has obtained a decree prior to winding-up, a statutory authority levying attachment to recover arrears of land revenue, a State which has obtained a decree for costs and unsecured creditors who have not obtained a decree are similarly placed.

22. The decision of the Apex Court in the case of *Dena Bank* (Supra) relied on by Mr. Mehta is altogether in a different context. Firstly, there is specific provision under the Karnataka Sales Tax Act. Secondly, it was not a case of the Company in liquidation. The present case is governed by the provisions contained in the Companies Act, 1956 and priorities are to be decided in accordance with the provisions of the Companies Act. The said decision, therefore, cannot be pressed into service for deciding the issue involved in the present case. The other two decisions relied upon by Mr. Mehta have also no application to the facts of the present case. The Court in those two cases was not called upon to decide the priority claim, keeping in mind the provisions of Companies Act in relation to the assets of the company in liquidation. Even otherwise, provisions of Section 529A of the Companies Act, 1956 were not brought on the statute book. After the insertion of these provisions in the Act, the whole order of settlement of priority claim of the creditors of the Company in liquidation has undergone a change. The OL, therefore, cannot act contrary to the terms and conditions of the sale nor he can act contrary to the provisions of the Act. He has, therefore, rightly conveyed to the applicants vide his letter dated 23.11.2007 that the dues pertaining to the pre-winding up period are to be settled by him as per the provisions of Section 529, 529A and 530 of the Companies Act, 1956 and that too with the prior sanction of this Court. The OL shall, therefore, hand over the possession of the property in question without any charge or encumbrance of sales tax liabilities and execute the sale deed accordingly.

23. These two applications are accordingly disposed of without any order as to costs.